IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-930

DANIEL J. EVANS, Governor of the State of Washington, et al.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO AFFIRM

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Appellees Atlantic Richfield Company and Seatrain Lines, Inc., hereby move, pursuant to Supreme Court Rule 16, that the judgment of the United States District Court for the Western District of Washington be summarily affirmed on the ground that the decision below is manifestly correct and the questions sought to be presented by the appeal are so insubstantial as not to require further briefing or argument.

STATEMENT OF THE CASE

1. The Challenged State Statute

At issue in this case is the constitutional validity of Washington's "Tanker Law," Chapter 125 of the 1975 Laws of the State of Washington (Revised Code of Washington §§ 88.16.170 *et seq.*), which is reproduced as

Appendix I to Appellant's Jurisdictional Statement. The Tanker Law regulates the size, design and navigation of oil tankers engaged in interstate and international trade -- an area long subject to exclusive regulation by the federal government — for the stated purpose of protecting the State's waters from the risk of oil spills. R.C.W. § 88.16.170.

The Tanker Law has three operative provisions:

(1) Section 3(1) (the "Tanker Embargo"), R.C.W. § 88.16.190(1), absolutely prohibits any oil tanker over 125,000 deadweight tons ("DWT") from entering Puget Sound — and thus from reaching any of the State's refineries or existing oil terminal facilities. (¶¶ 19, 107)[1]

(2) Section 3(2) (the "Design Requirements"), R.C.W. § 88.16.190(2), prohibits any oil tanker between 40,000 DWT and 125,000 DWT from entering Puget Sound unless it has all of the following design features: minimum shaft horsepower of at least one horsepower for each two and one-half DWT; twin screws; double bottoms underneath all oil and liquid cargo compartments; two radars, one of which must be collision-avoidance radar; and such other navigational systems as may be prescribed by the State Board of Pilotage Commissioners. A proviso to Section 3(2) (the "Tugboat Proviso") waives compliance with the Design Requirements if the tanker is at all times under the escort of tugboats with an aggregate horsepower of five percent of its deadweight tonnage.

(3) Section 2 (the "Pilotage Requirement"), R.C.W. § 88.16.180, provides that any oil tanker of 50,000 DWT or greater must employ a pilot licensed by the State of Washington while navigating Puget Sound.

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[1] Paragraph and Exhibit references are to the stipulation of facts incorporated into the Pre-Trial Order filed April 6, 1976, which constitutes the factual record in this case.

2. The Factual Background

The Tanker Law's regulation of the size, design and navigation of tankers permitted to enter Washington waters threatens to impose a scheme of piecemeal state regulation upon what the three-judge court below correctly described as "this most interstate, even international, of transportation systems." Jurisdictional Statement, Appendix C (hereinafter "Opinion"), at 8a. The United States now imports over 35 percent of its oil requirements. (¶ 47) More than 80 percent of this imported oil is brought into this country by tanker. (*Id.*) The vast majority of these vessels — carrying 94 percent of U.S. tanker oil imports — are registered in and fly the flags of foreign nations. (¶ 51)

Approximately two-thirds of the crude oil requirements of Atlantic Richfield's refinery at Cherry Point, Washington, on Puget Sound, are supplied by tanker deliveries from foreign sources. (¶ 16) All fifteen of the tankers over 125,000 DWT which prior to the Tanker Embargo called at Cherry Point were of foreign registry. (Ex. D) Of the 90 tankers between 40,000 and 125,000 DWT which have called at Cherry Point, over one-half were sailing under foreign registry. (Ex. C) The Tanker Law applies to all such tankers regardless of the national flag they fly. (¶ 12)

Tankers over 125,000 DWT are now in general use throughout the world because of the significant savings they provide (¶ 66) — up to 50 percent on longer runs. (¶ 67) At the end of 1975 there were 727 tankers over 125,000 DWT in use, representing 59 percent of the world's total tanker capacity. (¶ 52) All but four of these vessels fly foreign flags. (¶ 55) The Tanker Embargo permanently excludes all of these vessels from Puget Sound, regardless of the amount of oil they actually carry on any given voyage. (¶ 10)

In addition to receiving tankers engaged in foreign trade, Puget Sound ports will soon play a significant role in the transportation of oil from the North Slope of Alaska to the lower 48 states. Oil is expected to begin to flow through the Trans-Alaska Pipeline this year (¶ 15), and will reach its capacity of 2,200,000 barrels of oil per day by 1981. (¶ 21) It is currently anticipated that all of this oil will be transported by tanker to ports on the West Coast, with approximately 15 percent destined for the Puget Sound area. (*Id.*) Atlantic Richfield's Cherry Point refinery was specifically designed and built to refine North Slope crude oil. (¶ 15)

Plans to transport this oil to the lower 48 states rely substantially on the use of tankers over 125,000 DWT. Docking facilities under construction at Valdez, Alaska, at the southern terminus of the Trans-Alaska Pipeline, are designed to accommodate fully loaded tankers of up to 250,000 DWT. (¶ 23) One-third of the tankers to be employed in the Alaska trade — and a larger percentage of the total tanker capacity — will be in excess of 125,000 DWT. (*Id.*)

Atlantic Richfield has under construction four new tankers over 125,000 DWT, at a cost of over $200 million. (¶¶ 34, 35) Two of these tankers will be foreign flag and will be used to deliver foreign crude oil to Atlantic Richfield's United States refineries; the other two will be U.S. flag and are intended for use in transporting North Slope oil to West Coast ports, including — but for the Tanker Embargo — Puget Sound. (¶ 34)

3. Proceedings Below

Atlantic Richfield filed this lawsuit on September 8, 1975, the day the Tanker Law went into effect. Atlantic Richfield's complaint alleged that the Tanker Law was preempted by federal law, particularly the Ports and Waterways Safety Act of 1972 (PWSA); conflicted with

the PWSA and various other federal statutes; and unconstitutionally burdened interstate commerce and interfered with federal regulation of foreign affairs. Named as defendants were Washington Governor Daniel J. Evans and other state officials responsible for enforcement of the Tanker Law.[2] Because substantial issues under the commerce clause and foreign affairs provisions of the Constitution were raised by the complaint, a three-judge court was convened.

After the parties reached agreement on a detailed stipulation of facts, embodied in a Pre-Trial Order filed April 6, 1976, and filed exhaustive briefs, the three-judge court heard four hours of argument on June 25, 1976. The court also had before it briefs filed by several *amici curiae*, including briefs filed by the United States in support of its contention that "Congress by the passage of the Ports and Waterways Safety Act plainly intended to pre-empt the field of oil tanker regulation." Brief of the United States at 7.

The three-judge court issued its opinion and order holding the Tanker Law invalid on September 24, 1976. In a six-page per curiam opinion, the court held that Sections 3(1) and 3(2) of the Tanker Law — the Tanker Embargo, Design Requirements and Tugboat Proviso — were preempted by the PWSA. The court held that PWSA established a comprehensive federal scheme for regulating the navigation and safety design specifications of tankers. Opinion at 7a. The court found that the purpose of the PWSA was "to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions

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[2] Seatrain Lines, Inc., a shipping and shipbuilding firm which constructs and operates tankers over 125,000 DWT, subsequently intervened as a plaintiff, and joins with Atlantic Richfield in making this Motion to Affirm. Four environmental organizations and the King County (Seattle) Prosecuting Attorney intervened as defendants.

under which they would be permitted to operate." *Id.* at 8a. The court also found that "[b]alkanization of regulatory authority over this most interstate, even international, of transportation systems" — as would result if state regulation like Washington's Tanker Law were permitted — "is foreclosed by the national policy embodied in the PWSA." *Id.*[3]

The three-judge court further held that Section 2 of the Tanker Law, the Pilotage Requirement, was invalid as applied to tankers engaged in the "coastwise" (domestic) trade because "it conflicts with clear federal law," citing 46 U.S.C. §§ 215, 364. Opinion at 9a.[4]

The court, relying on *Ex parte Young*, 209 U.S. 123 (1908), also denied the motion of the defendant state officials to dismiss the complaint on Eleventh Amendment grounds. Opinion at 6a.

The three-judge court initially declined to enter injunctive relief, believing an injunction "unnecessary" on the presumption that the defendant state officials would respect its declaratory judgment. *Id.* at 12a. As soon as it became apparent that the defendants intended to continue enforcement of the statute notwithstanding the court's ruling, Atlantic Richfield moved for supplementary injunctive relief. After a hearing on November 12,

[3] The three-judge court found it unnecessary to address the other issues raised by Atlantic Richfield in its challenge to Sections 3(1) and 3(2) of the Tanker Law. Opinion at 12a.

[4] Appellants apparently concede the constitutional invalidity of the Pilotage Requirement, for they do not raise this issue as a question presented or discuss it in their Jurisdictional Statement. In any event, there can be no reasonable dispute that the Pilotage Requirement conflicts with these federal statutes. *Spraigue v. Thompson*, 118 U.S. 90, 95-96 (1886); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912); *Davis v. M/V Ester S*, 509 F.2d 1377, 1380-81 (5th Cir. 1975). Indeed, appellants agreed in the Pre-Trial Order that "46 U.S.C. § 215 . . . provides that a state . . . may not require such [state licensed] pilots on enrolled vessels" (i.e., those engaged in coastwise trade). (¶ 142)

1976, the three-judge court issued its Order of Permanent Injunction enjoining enforcement of the Tanker Law. Jurisdictional Statement, Appendix B. The injunction was stayed by this Court on January 10, 1977, pending final disposition of this appeal.

QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that Sections 3(1) and 3(2) of Washington's Tanker Law are invalid under the Supremacy Clause because they seek to regulate an area preempted by the federal government under the Ports and Waterways Safety Act?

2. Should *Ex parte Young*, 209 U.S. 123 (1908), be overruled?[5]

ARGUMENT

I. THE THREE-JUDGE COURT'S RULING THAT THE TANKER LAW HAS BEEN PREEMPTED BY THE PORTS AND WATERWAYS SAFETY ACT IS MANIFESTLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED

The holding of the court below that the Tanker Law's Tanker Embargo, Design Requirements and Tugboat Proviso have been preempted by the Ports and Waterways Safety Act is manifestly correct and should be

[5] If this Court should note probable jurisdiction, Atlantic Richfield will also brief and argue, as alternative grounds for affirming the judgment of the court below, that the Tanker Law is invalid even if the PWSA is not given preemptive effect because it conflicts with the PWSA, Coast Guard regulations thereunder, and the certification and permit provisions of the Tank Vessel Act as amended by the PWSA; that the Tanker Embargo is invalid because it conflicts with rights granted by the federal vessel registration, enrollment and licensing laws as interpreted in *Gibbons v. Ogden*, 22 U.S. 1 (1824); that the Tanker Embargo also conflicts with the Merchant Marine Act of 1970 and the Maritime Administration's Tanker Construction Program thereunder; and that the Tanker Law unduly burdens interstate

summarily affirmed by this Court without further briefing or argument. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

Appellants create the misleading impression that the decision of the court below was based on nothing more than the comprehensiveness of the regulatory scheme established by the PWSA, and studiously avoid any discussion of the terms of the federal statute or its legislative history. But, as the discussion to follow demonstrates — and as the per curiam opinion of the three-judge court reflects — examination of the PWSA and its legislative history can leave no reasonable doubt that Congress intended to occupy the field and preempt state regulation of oil tanker size, design and navigation for the purpose of environmental protection.

A. The PWSA and Its Legislative History Clearly Establish Congressional Intent to Preempt State Regulation

The Ports and Waterways Safety Act was enacted in 1972, Pub. L. No. 92-340, 86 Stat. 424, in order to establish a comprehensive scheme of federal regulation of oil tanker design, construction and operation for the purpose of protecting the marine environment against the danger of oil spills. *See* S. Rep. No. 92-724, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2766 (hereinafter the "Senate Report"), at 2766-69. The PWSA and Coast Guard regulations promulgated thereunder deal explicitly with regulation of tanker size, design, and movement, the precise areas of regulation attempted by

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and foreign commerce, impermissibly interferes in a field where uniform federal regulation is essential, and interferes with federal power to regulate foreign commerce, make treaties and conduct foreign affairs. Each of these issues was briefed and argued to, but not decided by, the court below.

Washington in its Tanker Law. Indeed, each feature of the Tanker Law has been expressly considered — and, for the most part, rejected — by the Coast Guard in the exercise of its regulatory authority under the PWSA.

In Title I of the PWSA, now codified at 33 U.S.C. §§ 1221 *et seq.*, Congress authorized the Coast Guard to establish vessel traffic systems and controls for environmental protection, including, *inter alia*, the authority to establish tanker size or speed limitations, or to restrict tanker operations to vessels having particular characteristics deemed necessary for safety. PWSA § 101(3), 33 U.S.C. § 1221(3). Title II of the PWSA amended the Tank Vessel Act, 46 U.S.C. § 391a, to authorize the Coast Guard to adopt uniform federal regulations for the design, construction, maintenance and operation of tankers for environmental protection. PWSA § 201(3), 46 U.S.C. § 391a(3); *see* Senate Report at 2767. Congress specifically required the Coast Guard to adopt design and construction standards to improve tanker maneuvering and stopping ability and to limit cargo loss in the event of an accident. PWSA 201(7), 46 U.S.C. § 391a(7).

The Coast Guard has acted to carry out this congressional mandate. Coast Guard regulations to implement Title I have established a vessel traffic control system for Puget Sound. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161 Subpart B. This system establishes a network of separated traffic lanes in Puget Sound, each 1,000 yards wide and separated by zones 500 yards wide, and requires vessel communications contact with the Coast Guard's Vessel Traffic Center in Seattle. (¶ 70, Exs. G, U) In the Rosario Strait area of Puget Sound, where such separated traffic lanes are not feasible, the Coast Guard prohibits the passage of more than one tanker over 70,000 DWT in either direction at any given time, a size limitation which is reduced to 40,000 DWT in adverse weather. (¶ 70) The Coast Guard has also

delegated to its local District Commander and Captain of the Port its authority under PWSA § 101(3), including the authority to exclude tankers over a given size if they determine such action is appropriate. 40 Fed. Reg. 6653 (Feb. 13, 1975), 33 C.F.R. Part 160.

Coast Guard regulations to implement Title II require all new tankers over 70,000 DWT to have such features as segregated ballast tanks which must carry only sea water and be so located as to provide protection against oil spillage in the event of accidental penetration of the hull. The regulations also impose limitations on cargo tank arrangement and size, and establish structural and damage stability requirements intended to reduce oil loss in the event of accident. 40 Fed. Reg. 48280 (Oct. 14, 1975), 41 Fed. Reg. 1479 (Jan. 8, 1976), and 41 Fed. Reg. 54177 (Dec. 13, 1976), 33 C.F.R. Parts 151, 157.

During the course of its development and promulgation of these regulations, the Coast Guard considered and expressly rejected requirements for double bottoms, twin screws, and extraordinary horsepower — all requirements of the Tanker Law — for a variety of reasons, including the need for uniform international design standards and doubts as to the efficacy of these features. *See* United States Coast Guard, Final Environmental Impact Statement, Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade (Aug. 15, 1975) (Ex. X) (hereinafter "Coast Guard EIS"), at 4-10, 60-76. Possible Coast Guard adoption of tug escort requirements continues under active consideration. Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976); *see also* Coast Guard EIS at 71.

Federal regulation under the PWSA is comprehensive, as the court below observed. But appellees have never contended — and the court below did not hold — that the comprehensiveness of the federal scheme in itself required the holding that the PWSA had preempted the field. The court below also had before it overwhelming evidence of explicit congressional intent to preempt state regulation of vessel size, design and movement, contained in both the statute itself and its legislative history.

Section 102(b) of the PWSA, 33 U.S.C. § 1222(b), was expressly intended to make "absolutely clear" congressional intent to preempt state regulation of vessels. H.R. Rep. No. 92-563, 92d Cong., 1st Sess. (1971) (hereinafter "House Report"), at 15. Section 102(b) provides that Title I does not "prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards." (Emphasis added) This language was added to the statute in committee in response to testimony urging that the bill be amended to make explicit congressional intent to occupy the field of vessel regulation. *See, e.g., Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. (1971) (hereinafter "House Hearings"), at 141, 170-72, 186. In particular, the Chairman of the National Transportation Safety Board urged adoption of uniform federal regulation of vessels because to fail to do so "could result in a patchwork quilt approach which would lack standard frequencies and equipment and would place a greater burden upon ships than a federally-regulated program. . . . [A] federally-controlled program would minimize the variety of requirements both foreign and domestic shipping would have to meet." House Hearings at 348-49. See also *id.* at 377 (Statement of Appellant Sierra Club urging "[n]ational, uniform Federal action").

During committee hearings, several congressmen specifically mentioned the need to preempt state regulation of vessels so as to prevent a state from imposing an

absolute limitation on the size of tankers permitted to operate in its waters, as Washington has attempted to do here. For example, Congressman Keith declared that state laws "banning giant tankers" should not be permitted, saying that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." *Id.* at 30. Congressman Tiernan agreed, adding that such a size limit would require "more vessels in carrying the fuels we need for our demands in keeping the economy going." *Id.* at 32. See also *id.* at 172; *Hearings on the Navigable Waters Safety and Environmental Quality Act Before the Senate Committee on Commerce,* 92d Cong., 1st Sess. 81 (1971) (Statement of Senator Inouye); Senate Report at 2792.

The House Committee Report explains that it was amending Section 102(b) to make explicit congressional intent to preempt state regulation of vessels:

> "This amendment was suggested since it was felt that H. R. 8140 [the bill which became the PWSA] does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. *The inserted language is a positive statement* retaining State jurisdiction over structures and *making clear that State regulation of vessels is not contemplated.*" House Report at 15 (emphasis added).

Indeed, the committee report notes that "one of the strong points of the legislation is the imposition of federal control in the areas envisioned by the bill which will insure regulatory and enforcement uniformity . . . ." *Id.* at 8.

Similarly, as the court below held, Opinion at 8a, the purpose of Title II of the PWSA was to establish uniform federal regulations governing the design, construction and operation of tankers. The necessity for uniform federal regulation of maritime affairs has been recog-

nized since the nation's founding. *See generally* Constitution Art. III, § 2, cl. 1; *The Lottawanna,* 88 U.S. 558, 575 (1875); *Gibbons v. Ogden,* 22 U.S. 1, 190 (1824). The need for national uniformity is nowhere more compelling than with regard to the design, construction and operation of the vessels of interstate and foreign trade themselves. *See Kelly v. Washington,* 302 U.S. 1, 14-15 (1937). In response to this need, Congress, starting with the first vessel inspection laws, 5 Stat. 304 (1838), and continuing to the present, has established a comprehensive scheme of federal regulation of vessel design, construction and operation. *See* 46 U.S.C. §§ 361 *et seq.*; Title 46, C.F.R.

In 1936, Congress made oil tankers subject to this comprehensive regulatory scheme with passage of the Tank Vessel Act, 49 Stat. 1889, 46 U.S.C. § 391a. Section 2 of the 1936 Act granted the Coast Guard authority to promulgate regulations establishing standards of tanker design, construction, equipment and operation, in terms almost identical to those of Section 201(3) of the PWSA, principally for the purpose of protecting "life and property." *See* Senate Report at 2781.

The purpose of the original Tank Vessel Act was to establish "a reasonable and uniform set of rules and regulations concerning ship construction, equipping, operation and manning . . . ." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936). Title II of the PWSA merely amended the Tank Vessel Act and expanded this comprehensive regulatory scheme to add express Coast Guard authority to adopt such uniform regulations for the purpose of environmental protection as well as for vessel safety. *See* Senate Report at 2786.[6]

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[6] Significantly, when concern subsequently arose over the safety of the tankers to be employed in carrying North Slope oil to West Coast ports, Congress responded by advancing to June 30, 1974, the deadline, contained in Section 7(C) of Title II, 46 U.S.C. § 391a(7)(C), for the adoption *by the Coast Guard*

Congressional intent to continue uniform national regulation of tanker design and movement is also demonstrated by the recognition in the PWSA and its legislative history of the desirability of uniform international standards. During its consideration of the PWSA, Congress was well aware that unilateral tanker regulation by the United States raised difficult and diplomatically sensitive foreign relations questions which had to be addressed with care in the federal statute. The Departments of State and Transportation expressed concern that unilateral imposition of design and construction standards by the United States on foreign flag vessels might violate our obligations under the International Convention for the Safety of Life at Sea ("SOLAS"), 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S. 27 (1960) (Ex. HH), and undermine the United States' active efforts to achieve international agreement on uniform standards of tanker design, equipment and operation at the then-impending 1973 Marine Pollution Conference held under the auspices of the Inter-Governmental Maritime Consultative Organization ("IMCO"), the maritime arm of the United Nations. *See* Senate Report at 2804, 2807-10. The Senate Commerce Committee also received a communication from twelve foreign governments protesting the prospect of unilateral tanker regulation by the United States. *Id.* at 2800-01.

Congress fully recognized the validity of these concerns. *See id.* at 2782. The report of the Senate Commerce Committee stated:

> "[T]he committee recognized that this has traditionally been an area for international rather than national action. Moreover, international solutions in this area are preferable since the problem of marine pollution is world-wide. . . .
>
> "The committee fully concurs that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards." *Id.* at 2783.

of regulations for tankers in domestic trade, Trans-Alaska Pipeline Authorization Act § 401, Pub. L. No. 93-153, 87 Stat. 589 (1973), rather than authorizing state regulation of tanker size, design or operation. *See* 119 Cong. Rec. 22836-39 (1973).

Accordingly, Title II was amended in two significant respects. First, in Section 7(C), 46 U.S.C. § 391a(7)(C), Congress postponed the earliest effective date of regulations under Title II until January 1, 1974, after the IMCO Conference, and authorized the Coast Guard further to delay implementation of these regulations until January 1, 1976, in order to allow additional time for development of international standards. *See* H.R. Rep. No. 92-1178, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2811 (hereinafter "House Conference Report"), at 2812-13.[7] Second, Section 7(C) authorized the Coast Guard to defer to internationally adopted standards "which generally address the regulation of similar topics for the protection of the marine environment," even though such standards might not be identical to those initially proposed by the Coast Guard. Senate Report at 2788; House Conference Report at 2813.[8]

[7] Congress subsequently advanced to June 30, 1974, the deadline for promulgation of regulations with respect to tankers in domestic trade. *See* note 6 *supra*. This amendment did not affect the Coast Guard's discretion to postpone implementation of regulations for tankers in foreign trade in order to allow additional time for development of uniform international standards.

[8] The regulations adopted by the Coast Guard under the PWSA in fact defer substantially to the standards of the International Convention for the Prevention of Pollution from Ships (Ex. PP), adopted by the 1973 IMCO Conference and currently awaiting ratification by member nations. The Coast Guard explains that unilateral United States action would jeopardize

Congress thus recognized the desirability of uniform international standards and the international sensitivity of unilateral American tanker regulation; indeed, it amended Title II to provide the Coast Guard with "more flexibility with respect to the unilateral imposition of standards on foreign vessels," in order to minimize these international problems. House Conference Report at 2813. In light of this, it is inconceivable that Congress could have intended to allow independent action by the individual states, having neither the same sensitivity to the international implications of unilateral tanker regulation nor the capacity to deal with any adverse international repercussions. *See generally United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 232-33 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Appellants are unable to rebut this compelling evidence of congressional intent to preempt state regulation. They rely principally on the personal opinion of Senator Magnuson of Washington that the decision of the court below was wrong. But, as the Court recently held, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

Appellants also point out that Title II refers to "comprehensive minimum standards" of tanker design and construction. Use of the word "minimum" merely signifies congressional intent to leave the nuts and bolts of ship construction where they have always been, with the ship owner or shipbuilder, subject to compliance with Coast Guard regulations. In this sense, all of the Coast Guard's detailed regulations on vessel construction for

ratification of the Convention by other nations and risk other adverse international repercussions. Coast Guard EIS at 4-8, 219.

purposes of vessel safety under the federal inspection laws and the original Tank Vessel Act are likewise "minimum standards." Congress has repeatedly used the term "minimum standards" in just this sense in other laws where, as here, preemption was intended. *See, e.g.*, Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671 *et seq.*; *Tenneco, Inc. v. Public Service Comm'n*, 489 F.2d 334 (4th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* Indeed, the court below used the term "minimum design specifications" in this sense in describing the Tanker Law. Opinion at 8a.

Appellants also suggest that Section 3(2) of the Tanker Law is not preempted by the PWSA because its Design Requirements can be avoided — at a price — if a tanker employs a tugboat escort. But the Court below correctly concluded that the Tugboat Proviso of Section 3(2) has likewise been preempted by the PWSA. Opinion at 8a. The Tanker Law's combination of Design Requirements and Tugboat Proviso substantially interferes with the PWSA's objective of uniform federal regulation of tanker design. The effect of this provision is to pressure tanker owners to incorporate the state's preferred design features in their vessels and to impose an economic penalty for failing to do so. The PWSA gives the Coast Guard ample authority to adopt such a regulatory approach, PWSA §§ 101(3)(iii), (iv), and in fact the Coast Guard has tug escort requirements under active consideration, Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), which "are intended to provide uniform guidance for the maritime industry and Captains of the Port for the use of tugs . . . ." *Id.* at 18771. The Coast Guard has suggested that tugboat escorts will be required for vessels not incorporating certain design features in addition to those expressly required by its regulations, thereby offering the prospec-

tive ship owner "incentives to incorporate those individual added design features which he feels are to his economic advantage, while at the same time allowing him flexibility in evaluating the economic trade-off of vessel design." Coast Guard EIS at 71.

Finally, appellants claim that even the Coast Guard does not regard the PWSA as precluding state regulation, quoting a Coast Guard statement that its regulations "are not a complete and comprehensive answer." Taken in context, however, all the Coast Guard was saying there was that its regulatory supervision of the design and movement of tankers would be continuous and evolving. *See* Coast Guard EIS at 1, 81-82. In fact, the Coast Guard has consistently taken the position that the PWSA and its regulatory authority thereunder were intended to preempt the field. *See* Brief of the United States as Amicus Curiae; Opinion of the Coast Guard General Counsel, dated July 10, 1975 (appended to Atlantic Richfield's Trial Brief). This construction of the PWSA by the agency charged with its enforcement is entitled to "great weight". *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971); *see also Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1152 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

B. The Permissibility of State Regulation of Port Facilities and Pollution Liability Does Not Support State Regulation of Vessel Design and Operation

Appellants argue that the Tanker Law regulates in an area of "traditional state competence," relying on several cases which uphold state power to regulate various local aspects of port and harbor safety against commerce clause challenges, and point to several federal statutes other than the PWSA which allow the states a role in port regulation and pollution liability. But neither these cases nor these statutes involve state regulation of the design, construction or operation of the vessels of interstate and foreign trade themselves in the face of a federal statute occupying the field.[9] As shown above, regulation of tanker design, construction and operation has long been subject to extensive federal control under the vessel inspection laws, the Tank Vessel Act, and now the PWSA. The very fact that the statutes on which appellants rely explicitly invite state participation in various other aspects of pollution control highlights the fact that Congress in enacting the PWSA did not intend to share regulatory authority over tanker design and movement with the states. See Opinion at 9a.

Appellants first rely on the Federal Water Pollution Control Act, and this Court's holding in *Askew v. American Waterways Operators*, 411 U.S. 325 (1973), that the FWPCA did not preempt state laws imposing strict liability for oil pollution damage. But, as the three-judge court recognized, the Florida statute at issue in *Askew* dealt with oil spill liability rules, and, unlike Washington's Tanker Law, "did not attempt to regulate the design of the tanker or tanker operations." Opinion at 10a. Moreover, the FWPCA — in contrast to the PWSA — expressly disclaims any intent to preempt the states "from imposing any requirement or liability with respect to the discharge of oil." 33 U.S.C. § 1321(o)(2).

Appellants also contend that the Deepwater Port Act of 1974 gives the states an absolute veto over whether

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[9] This Court's decision in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), is plainly distinguishable from the instant case. The Court in *Huron* upheld a Detroit smoke abatement ordinance as applied to vessels on the ground that the preemptive scope of the federal vessel inspection laws was at that time limited to vessel safety and did not encompass air pollution control. As the three-judge court pointed out, passage of the PWSA specifically expanded the purposes and preemptive scope of federal law to include protection of the marine environment against oil spills from tankers. Opinion at 10a.

supertankers may use such deepwater ports located more than three miles off their shores. Appellants' contention simply misreads the statute. The Deepwater Port Act does not give any state the power to regulate the size, design or movement of the vessels using such a deepwater port facility. On the contrary, 33 U.S.C. § 1509 expressly requires the Secretary of Transportation to prescribe regulations governing vessel movement, equipment and operation for the purpose of navigational safety and environmental protection. The Deepwater Port Act does give adjacent states a veto power over construction of such a deepwater port, but this veto power is based on an extension of the states' existing power to regulate port facilities on land[10] and was adopted by Congress primarily to afford coastal states an opportunity to protect themselves from the impact of land-based industrial development which a deepwater port would generate. S. Rep. No. 93-1217, 93d Cong., 2d Sess. (1974), 1974 U.S. Code Cong. & Ad. News at 7537-39.

Finally, appellants contend that the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* (CZMA), and the approval of the Washington Coastal Zone Management Program by the National Oceanic and Atmospheric Administration (NOAA) on June 1, 1976, somehow bear on the issue of whether the Tanker Law is preempted by the PWSA. But there is nothing in the CZMA which would allow the states — or authorize NOAA to allow the states — to interfere with the Coast Guard's exclusive regulation of vessel design and movement under the PWSA. As appellants are forced to admit, such a result is expressly barred by Section 307(e) of the CZMA, 16 U.S.C. § 1456(e).

Equally important, the basic premise of appellants' argument — that the Tanker Law is an integral part of

[10] A deepwater port is defined in the Act as "any fixed or floating manmade structures other than a vessel . . . ." 33 U.S.C. § 1502(10). Compare PWSA § 102(b).

the State's Coastal Zone Management Program approved by NOAA — is not supported by the facts. As the reply brief filed by the United States in the court below points out at page 3, appellants' contention "is utterly without foundation, for the Coastal Zone Management Act and the State of Washington's plan thereunder have nothing to do with the field of tank vessel regulation." The Tanker Law is mentioned only once in passing in the 300-page Program document, at page 18, and that one brief reference noted that the Law was being challenged as unconstitutional. The affidavit of the Assistant Administrator of NOAA, submitted by the United States together with its reply brief, expressly disclaims any intention to approve Washington's Tanker Law as part of the State's Coastal Zone Management Program. (Ex. BBB)

Nor is the Tanker Law an integral part of the State's proposal for a single oil terminal facility to be located at Port Angeles. The Tanker Law was enacted by the State Legislature nearly two years ago and makes no mention of the single terminal concept. No single terminal legislation has been passed by the State, and the single terminal remains a distant dream. Despite the State's attempt to include the single terminal proposal in its Program by a last-minute amendment while this case was before the district court, the Program acknowledged even then that the "possibility" of development of such a terminal was only a "proposal" which should be studied further to make a "feasibility determination." Amendments to Washington State Coastal Zone Management Program, March 29, 1976 (Ex. AAA), at 11.

C. Tanker Regulation Must Remain Exclusively in the Federal Forum

Over the past two months public attention has focused on the question of tanker safety in the wake of several

tanker incidents. In light of this, it is important to reiterate that the issue presented in this case is not whether there should be more stringent regulation of tanker safety, or what the content of such regulations should be. As the United States stated in its brief to the court below, at 9-10:

> "In the final analysis, the question is not whether the design and operation of oil tankers should be regulated and controlled in the interests of the marine environment, for it is common ground that such regulation is required. The question in this case is whether that control is to be exercised and the scope of the regulations determined by the federal government in the manner which Congress has prescribed, or whether those determinations are to be made by the inconsistent and diverse action of the several states."

The risk of such "inconsistent and diverse actions" is real. Already, the State of Alaska has enacted legislation which requires payment of substantial "risk charges" as well as use of tug escorts by tankers unless the tanker meets design requirements entirely different from those required by the Washington Tanker Law. Alaska Statutes §§ 30.20.010 *et seq.* California and other states are waiting in the wings, as their amicus briefs filed in the court below and in this Court attest. *See also* ¶ 153. The problem obviously created by the probability of proliferating state regulation of the size, design and navigation of tankers emphasizes the need for national uniformity in the regulations imposed upon vessels engaged in interstate and foreign commerce. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 627-28, 639 (1973); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945).

Congress in enacting the PWSA recognized this need for uniform federal legislation and acted to preempt

such diverse and potentially conflicting state laws. If the appellants are dissatisfied with the Coast Guard's regulatory efforts, their remedy is to seek additional action at the federal level. Pursuing this course, the appellant environmental groups have filed suit against the Coast Guard charging that its regulations do not comply with its statutory mandate under the PWSA. *Natural Resources Defense Council v. Coleman*, Civil Action No. 76-0181 (D.D.C., filed Feb. 2, 1976). Similarly, legislation has already been introduced in the new Congress to amend the PWSA to require adoption of more stringent regulations, H.R. 711, 95th Cong., 1st Sess. (Jan. 4, 1977); S. 182, 95th Cong., 1st Sess. (Jan. 11, 1977); *see* 123 Cong. Rec. S409 (daily ed. Jan. 11, 1977), and hearings on this subject were held by the Senate Commerce Committee on January 11 and 12. The Constitution, the PWSA, and common sense require that tanker regulation remain exclusively in this national forum.

II. THE ELEVENTH AMENDMENT DOES NOT BAR A SUIT AGAINST STATE OFFICIALS SEEKING TO ENJOIN THEIR ENFORCEMENT OF AN UNCONSTITUTIONAL STATE LAW

The other issue raised by appellants in their Jurisdictional Statement is whether a suit against state officials to restrain their enforcement of a state statute invalid under the federal Constitution is a suit against the State for purposes of the Eleventh Amendment. Appellants seek to put in issue the continued viability of *Ex parte Young*, 209 U.S. 123 (1908), where the Court held that such a suit is not barred by the Eleventh Amendment. The Court held that such a suit does not present any challenge to the legitimate sovereignty of the State, and that a state official attempting to enforce an unconstitutional statute can obtain from such an invalid

statute no immunity from responsibility to the superior authority of the federal constitution. *Id.* at 159-60.

Appellants suggest no reason why *Ex parte Young* should now be overruled. This Court has never doubted its continuing viability. As the Court unanimously held in *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *See also Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952).

Appellants contend that appellees may have been entitled to bring an action in the state courts for declaratory relief — though apparently not for the injunctive relief Atlantic Richfield also sought, and obtained, in federal court. Even if this were true, it is irrelevant to the Eleventh Amendment issue, which goes to the question of the federal courts' judicial power. As this Court recently held in *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972), "the availability of declaratory relief in [the state] courts on appellants' federal claims is wholly beside the point." *See also Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Moreover, this Court has indicated that in determining whether a suit is brought against a state for purposes of applying the Eleventh Amendment, it is appropriate to look to the law of the state in question. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 463 (1945). Under Washington law "when the constitutionality of a statute is challenged the action is not one against the state; rather, it is one against the named defendant individually . . . ." *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974). It is singularly inappropriate for defendants to suggest that the Eleventh Amendment affords them immunity from suit in this Court when the Washington Supreme Court does not consider such a suit to be a suit against the State.

III. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be summarily affirmed.

Respectfully submitted,

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